

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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In the Matter of:

Creation of a Low
 Power Radio Service

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MM Docket No. 99-25

AUG 19 2005

Federal Communications Commission
 Office of Secretary

To: The Commission

**COMMENTS OF THE UNIVERSITY OF SOUTHERN CALIFORNIA
 IN RESPONSE TO SECOND ORDER ON RECONSIDERATION AND
FURTHER NOTICE OF PROPOSED RULEMAKING**

The University of Southern California ("USC"), by its attorney, hereby comments on the Commission's *Second Order on Reconsideration* and *Further Notice of Proposed Rulemaking* (the "Order"), 20 FCC Rcd 6763 (2005), 70 Fed. Reg. 39182, 39217 (published July 7, 2005).

USC takes no position on the merits of low power FM radio. As the Order itself recognizes, LPFM is a very new, not fully implemented and as yet untested broadcast service. There is no way at this seminal juncture to know whether low power FM will ever approach the lofty public interest goals the Commission postulated for it a few short years ago, or whether in fact its economic and competitive disadvantages will end up outweighing its benefits.¹ LPFM is an unknown quantity.

¹ *Creation of Low Power Radio Service*, 15 FCC 2d 2205 (2000). The stated goals were: "to create a class of radio stations designed to serve very localized communities or underrepresented groups within communities," *id.*, 15 RR 2d at 2208 ¶ 4; and "that any new LPFM service specifically include the voices of community based schools, churches and civic organizations," *id.*, ¶ 5. The Order proffers no research, or

There is, on the other hand, no dispute that FM translators have for decades provided valuable broadcast service throughout the nation and it is disconcerting that the Commission would give serious consideration to requiring translators to protect LPFM stations while the latter service is still in its infancy and its true worth as a community service is uncertain.

These Comments concern Part IV, Section 3 of the Order: Interference Protection Requirements, paras. 29-34, and the Commission's intention "to reevaluate the co-equal status of LPFM and FM translator stations."² More specifically, USC is alarmed at the possibility that the Commission might be willing to dismiss pending translator applications in order to afford further licensing opportunities for LPFM stations.³

USC has no translators. It is the licensee of four full-power reserved-band Southern California noncommercial FM stations (KUSC, Los Angeles; KDSC, Thousand Oaks; KPSC, Palm Springs; and KQSC, Santa Barbara). KUSC, USC's flagship station, is widely recognized as one of America's premiere public broadcast stations.⁴

even anecdotal evidence, to indicate whether these expectations have been or are in the process of being achieved since LPFM was codified barely five years ago. The prescient 2000 admonition by then-Commissioner Powell, that in creating a new service the Commission should be certain to "first do no harm," Statement of Commissioner Michael K. Powell, Dissenting in Part, id., at 15 RR 2d 2323, resonates just as resoundingly today when the agency is actively reconfiguring the fledgling LPFM service, and is considering additional changes to enhance it at the expense of FM translators, even before the initial licensing phase is complete. *See, also, id.*, 15 RR 2d at 2206 ¶ 2, and the Commission's pledge in initiating LPFM "to preserve the integrity and technical excellence of existing FM radio service."

² Order, ¶ 31.

³ *Id.*, ¶ 33.

⁴ KDSC, KPSC and KQSC rebroadcast KUSC's programs.

KUSC cannot be received off-air in San Diego, over 100 miles to the south. In response to numerous requests from prospective KUSC listeners there over many years,⁵ during the non-reserved band filing window in March 2003 USC applied for three new San Diego FM translators in the hope of gaining one. Alas, all three applications are mutually exclusive and so, for over two years, USC has been waiting to learn whether, in accordance with Commission rules and the comparative policies announced in the 2003 FM Translator Auction Filing Window⁶ and in subsequent orders, USC will be able to provide KUSC's programs to listeners in San Diego via FM translator.⁷

The Order points out at para. 31 that the Media Bureau has already granted approximately 3300 March 2003 singleton translator applications, with some 8000 mutually exclusive applications still pending.⁸ The Commission posits, *id.*, that the sheer, unanticipated volume of March 2003 filings has precluded LPFM licensing, though it acknowledges that this is not the case in major market areas, where few if any LPFMs could ever have been authorized.⁹

⁵ KUSC has been sending its programming via satellite to a San Diego cable TV provider; however, even this hybrid coverage is scheduled to be terminated shortly.

⁶ Public Notice, FM Translator Auction Filing Window and Application Freeze, DA 03-359, February 6, 2003 (the "Window Notice"), annexed hereto.

⁷ The delay has been prolonged by the six-month processing stay directed by the Commission in the Order, *see* ¶ 33.

⁸ In mutually exclusive cases where at least one competitor proposes commercial operation, auctions are to be used to determine the winning applicant. Where all competitors for a station are noncommercial applicants, under the rules the winner is determined pursuant to the Commission's NCE point system; *see* ¶¶ 47 C.F.R. 73.5000(b), 73.7001(b).

⁹ The Commission's LPFM Channel Finder confirms that new FM translators have no preclusive effect on LPFM in San Diego. The undersigned entered the USC translator applications' coordinates into the Channel Finder. It announced that no LPFM on any frequency is possible there "due to interference caused to *authorized FM broadcast stations*" (emphasis added.)

At para. 33, the Commission asks, *inter alia*, whether it should “dismiss all pending applications for new FM translator stations and make potential refilings subject to the resolution of the licensing issues raised in this proceeding? Should [it] dismiss the pending mutually exclusive FM translator applications?”

Dismissal would be egregiously unfair to USC and other pending applicants. USC expended substantial time and resources to timely file its applications, in response to strong listener demand and upon the Commission’s explicit assurance that permittees would be selected among the filers in accordance with agency rules, policies and standards. All of the translator applications -- singleton and MX -- were filed during the same window. If USC had had the good fortune to be a singleton, it would now be a translator permittee or licensee. Its applications, submitted at the Commission’s invitation, should not be discarded -- after more than two years of delay -- due in effect to bad luck!

Dismissal of the pending applications would contravene the Commission’s rules for choosing between mutually exclusive applicants; *see, e.g.*, 47 C.F.R. §§ 1.2101, *et seq.*; 73.5000, *et seq.*, 73.7000, *et seq.*; and would offend long-established case precedent. The attached Window Notice states at 4, n.6, that “[m]utually exclusive commercial applications will proceed to auction.” The footnote continues that “[t]he newly adopted comparative standards to select among competing applicants for NCE broadcast stations have not yet been implemented because they have been challenged in court.” The court challenge was subsequently rejected and the NCE comparative point system is now formally incorporated into the rules, Section 73.7000, *et. seq.*

It is “a ‘well-settled rule that an agency’s failure to follow its own regulations is fatal to the deviant action.” *Florida Institute of Technology v. FCC*, 952 F.2d 549, 553, 70 RR 2d 423 (D.C. Cir. 1992), *citing Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356, 1359 (D.C. Cir. 1979) (quoting *Union of Concerned Scientists v. Atomic Energy Comm’n*, 499 F.2d 1069, 1082 (1974)). “*Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned . . . for therein lies the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action.” *Reuters Limited v. FCC*, 781 F.2d 946, 59 RR 2d 1063, 1068 (1986) (*citation omitted*.) The court in *Reuters* amplified, *id.*, that “[s]imply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life.”

USC and the other 2003 translator participants were promised in the Window Notice and under the rules that all qualified applicants would be compared in accordance with FCC rules and policies, depending on their commercial or noncommercial status. *See* attached Window Notice. For the Commission to dismiss still-pending applications, after granting many, because there were more filers than expected, would illuminate the “agency’s failure to follow its own regulations,” *Florida Institute of Technology*. This would prove “fatal to the deviant action,” *id.*¹⁰

¹⁰ Each of the court decisions cited above relates to the cutoff rules for FM rulemaking proceedings and the propriety of FCC rulings in treating (or not treating) similarly situated proponents fairly for comparative purposes. In that respect as well as for the black letter legal mandate that an agency must adhere to its own rules, these citations are apposite here.

USC understands that, at the end of the day, it may wind up with no translators. But USC is as entitled as any serendipitously singleton March 2003 applicant to have the chance to at least compete for one. Thousands of translator applications have been processed and granted. It would be arbitrary and unreasonable to treat thousands of others, filed by equally qualified applicants, differently for reasons of administrative convenience -- singletons are much easier to process than MX applications -- on the convenient ground that many have already been approved.¹¹

As the Window Notice confirms, singleton status was not a prerequisite for grant of new FM translator actions.¹² Nor was a 'first come, first served' policy ever proposed. USC seeks what it was promised when it responded to the Window Notice: a fair opportunity under the rules to be a translator licensee.¹³

USC understands that Commission staff labor under a heavy workload. The multitudinous March 2003 translator filings have increased the burden. USC recommends that a settlement window be promptly opened, allowing MX translator applicants to seek agreements for the dismissal of competing applications. The processing freeze, now due to end on September 17, could be extended during the

¹¹ The Window Notice set no limit on the number of translators that would be authorized. *See* Attachment. Moreover, the LPFM licensing process was well under way when the translator window was opened and the Commission was surely aware of potential preclusive effects which translators might have on low power FM stations. As noted above, n.9, *supra*, no LPFM stations can be licensed to San Diego due to interference from existing FM stations.

¹² Indeed, since most remaining MX cases would presumably go to auction, thereby substantially enriching the U.S. Treasury, it is ironic that the Commission is weighing the possibility of eliminating that lucrative prospect in this instance. The rules do not contemplate LPFM auctions.

¹³ USC also urges that there should be no difference in the relative protection status versus LPFMs of translator stations applied for during the March 2003 filing window.

settlement window. When the window closes, the remaining translator applications should quickly be disposed of as initially promised, according to the rules. Hopefully such a settlement period would eliminate numerous MX situations, thus helping conserve the agency's scarce resources while assuring that all March 2003 translator applicants -- whether they happen perchance to be singleton or MX -- are treated equitably.

WHEREFORE, for these reasons, USC urges the Commission to not dismiss the remaining mutually exclusive FM translator applications, but instead to process them under established policies and procedures.

Respectfully submitted,

**THE UNIVERSITY OF SOUTHERN
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By: _____


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Attachment

August 19, 2005

ATTACHMENT

**February 6, 2003 Public Notice
FM Translator Filing Window and Application Freeze**



PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
445 12th STREET, S.W.
WASHINGTON, D.C. 20554

News Media Information: (202) 418-0500
Fax-On-Demand: (202) 418-2830
Internet: <http://www.fcc.gov>
<ftp.fcc.gov>

DA 03-359
February 6, 2003

FM Translator Auction Filing Window and Application Freeze

Notice and Filing Requirements Regarding March 10–14, 2003 Window for Certain FM Translator Construction Permits; Notice Regarding Freeze on the Acceptance of FM Translator and FM Booster Minor Change and FM Booster New Construction Permit Applications from February 8 to March 14, 2003.

Report No. AUC-03-83-A (Auction No. 83)

The Media Bureau ("MB") and the Wireless Telecommunications Bureau ("WTB") announce an auction filing window for certain FM translator station construction permit applications. The filing window will open on March 10, 2003, and close on March 14, 2003. In connection with this window, MB also announces that it will not accept FM translator and FM booster minor change construction permit applications and FM booster new construction permit applications between February 8, 2003, and March 14, 2003.

Scope: The window is available for non-reserved band (channels 221 to 300) proposals for new FM translator stations and major modifications to authorized FM translator facilities.¹ The Commission also will consider those FM translator station new and major modification applications that were received on or before November 26, 1997, but for which no "A" cut-off list had been released by that date ("Frozen FM Translator Applications").² Also on file are a number of FM translator station

¹ See *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order*, 13 FCC Rcd 15920, 15975 & n.153 (1998) ("*Broadcast First Report and Order*"), granted in part and denied in part, 14 FCC Rcd 8724 (1999), amended by 14 FCC Rcd 14521 (1999) (granting Bureaus delegated authority to hold separate auctions for each type of broadcast service). A window open for proposals in the non-reserved band provides a filing opportunity for both noncommercial educational ("NCE") and commercial FM translator applicants. See 47 C.F.R. § 74.1202(b) (specifying, for example, that noncommercial FM translators may be authorized to operate on Channels 201-300).

² See *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Fixed Service Licenses, Notice of Proposed Rulemaking*, 12 FCC Rcd

new and major modification applications filed after November 26, 1997, with “freeze waiver” requests (“Freeze Waiver Applications”). These applicants also may participate in the filing window. Freeze Waiver Applications have not been protected from subsequently filed FM translator minor change applications during the *Competitive Bidding NPRM* freeze, and this policy will continue until the window is closed. Accordingly, Freeze Waiver Applications must protect all minor change applications filed on or before February 7, 2003, in order to be considered in the upcoming window, the same requirement that will apply generally to new FM translator station and major change proposals submitted for the first time in the filing window.³

Application Freeze. The Commission imposed a freeze on the filing of FM translator new and major change applications in the *Competitive Bidding NPRM*. MB has continued to process and grant FM translator minor change and FM booster applications under its processing rules since the inception of the freeze. However, MB will institute a temporary freeze on the acceptance of minor change FM translator applications on all channels (channels 201-300) at 12:01 a.m. Eastern Time (“ET”), February 8, 2003. The freeze shall remain in effect until the close of the window. Minor change applications filed during this freeze will be dismissed.

Participation. *All* applicants for new FM translator stations and major modifications to authorized FM translator facilities **must**:

- **If Form 349 IS NOT on file:** File electronically FCC Form 349, Application for Authority to Construct or Make Changes in an FM Translator or FM Booster Station, between 12:01 a.m. ET, March 8, 2003 and 6:00 p.m. ET, March 14, 2003. Only Section I, the Tech Box of Section III-A, and the Section VI Certification must be completed at this time. See Attachment A for more information regarding the completion of Form 349. See Attachment D regarding the electronic filing of the Form 349. No fee is required.

Note: A separate Form 349 must be submitted for each new station and major modification proposal.

- **If an FCC Form 349 Frozen FM Translator Application or Freeze Waiver Application IS currently on file:** The applicant should confirm that the information on file is accurate and complete.
 - If no changes in the previously filed Form 349 applications are necessary, the applicant must only file Form 175, as discussed in the next paragraph. The Form 175 must include the file number of **all** previously filed Form 349 applications. Failure to

22363, 22409 (1997) (establishing freeze on the filing of applications for construction permits for new stations and for major changes to existing facilities in all commercial broadcast services) (the “*Competitive Bidding NPRM*”).

³ Frozen FM Translator Applications that were technically acceptable at the time of filing will be entitled to consideration with any subsequently filed and mutually exclusive minor change application. New and major change applications may be filed during the window that are in conflict, either directly or indirectly, with a Frozen FM Translator Application and/or a Freeze Waiver Application. A minor change proposal in conflict with a Frozen FM Translator Application must be filed by February 7, 2003.

include the file number of a pending Form 349 application on the Form 175 will result in dismissal of that Form 349 application.

- If **any** information in a Frozen FM Translator Application or Freeze Waiver Application is no longer accurate and complete, the applicant must file a new Form 349 application electronically, completing Section I, the Tech Box of Section III-A, and the Section VI Certification. See Attachment D regarding the electronic filing of the Form 349. Paper amendments to pending Form 349 applications will not be accepted. By separate filing to the Office of the Secretary, the applicant must request dismissal of the pending paper-filed Form 349 application. A courtesy copy of this dismissal request should be sent to James Bradshaw at 445 12th Street SW, Washington D.C. 20554, Audio Division, Room 2-B450.
- **File electronically a short-form application (FCC Form 175)** by 6:00 p.m. ET March 14, 2003. See Attachments A and B for more information regarding the completion of Form 175, including information on the broadcast new entrant bidding credit. See Attachment C for information regarding the electronic filing of the Form 175. Applicants must specify the CDBS-assigned file number(s) of all Form 349 application(s) on Form 175, at Exhibit F ("Miscellaneous Information").

Note: Applicants may submit only one Form 175 regardless of the number of Form 349s filed.

- Comply with all provisions outlined in this Public Notice and applicable rules of the Commission.

An applicant's failure to reference a pending Form 349 application on its Form 175 will result in the dismissal of that Form 349 application. No consideration will be given any proposal for which the required engineering information is not on file by the close of the window. No application filing fee is required at this time.⁴

Application Processing. After the close of the window, the Commission will make mutual exclusivity determinations with regard to all timely and complete filings. Applications received during the filing window that are not mutually exclusive with any other applications submitted in the filing window will be identified by subsequent public notice. Applicants identified as non-mutually exclusive will be instructed to submit the complete FCC Form 349 and filing fee, if required, within 30 days. No amendments to the FM translator filing window Form 349 application, technical or otherwise, will be accepted between the close of the application filing window, March 14, 2003, and the public notice listing the non-mutually exclusive FM translator applications. Complete FCC Form 349 non-mutually exclusive applications will be processed and the staff will release public notices listing those applications determined acceptable for filing. Petitions to deny must be filed within 15 days of the public notice announcing acceptance of the application at issue.⁵

⁴ Given the general inapplicability of the application filing fee at this time, applicants should not respond to Section I, question 3 of FCC Form 349.

⁵ See *id.* § 73.5006(b), 74.1233(d)(4).

MB and WTB will issue a public notice identifying mutually exclusive applications received during the window.⁶ This public notice also will specify a settlement period for resolving application mutual exclusivity by the filing of technical amendments, dismissal requests, and requests for approval of universal settlements.⁷ Technical amendments submitted by applicants to resolve conflicts must be minor, as defined by the applicable rules of the FM translator service, and must not create any new mutual exclusivity or other application conflict.⁸ No amendments to the FM translator filing window Form 349 application, technical or otherwise, will be accepted between the close of the application filing window, March 14, 2003, and the public notice listing the mutually exclusive FM translator applications. An applicant may only file a technical amendment between the release of the public notice listing the mutually exclusive FM translator applications and the close of the specified settlement period.

As discussed further in Attachment A, applicants will not be permitted to make major modifications to their FCC Form 175s.⁹

The collusion prohibition set forth in 47 C.F.R. § 1.2105 (c) applies to the FM translator auction. To insure the competitiveness and integrity of the auction process, the Commission's Rules prohibit competing applicants from communicating with each other during the auction about bids, bidding strategies, or settlements. As further detailed in Attachment A to this public notice, this prohibition becomes effective at the Form 175 filing deadline. Mutually exclusive FM translator applicants may communicate with each other for the purpose of resolving conflicts only during a settlement period that will be specified in a forthcoming public notice.¹⁰

For additional information, contact James Bradshaw or Lisa Scanlan at the Audio Division, Media Bureau at (202) 418-2700.

List of Attachments:

Attachment A: Pre-Auction Procedures

⁶ See *id.* § 74.1233(d)(3). All mutually exclusive applications will be considered under the relevant procedures for conflict resolution. Mutually exclusive commercial applications will proceed to auction. The Commission is in the process of completing a rulemaking for mutually exclusive situations involving mixed application groups consisting of both NCE and commercial applicants. See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd 3833 (2002). The newly adopted comparative standards to select among competing applicants for NCE broadcast stations have not yet been implemented because they have been challenged in court. See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 15 FCC Rcd 7386 (2000), *sub. nom.*, *American Family Association, Inc. v. FCC*, appeal docketed, Case No. 00-1310 (D.C. Cir. July 14, 2000).

⁷ See *id.* § 73.5002(d)(3).

⁸ See *id.* § 74.1233(a)(1).

⁹ See *id.* § 1.2105(b).

¹⁰ See *id.* § 73.5002(d).

Attachment B: Guidelines for Completion of FCC Form 175 and Exhibits
Attachment C: Electronic Filing and Review of the FCC Form 175
Attachment D: Electronic Filing of the FCC Form 349